



Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

At the Preliminary Hearing of February 8, 1995, Administrative Law Judge Shannon S. Krysl elected to telephone conference with Dr. Linda L. Francisco in order to clarify certain ambiguities contained in the doctor's medical reports on claimant. This telephone conference was necessitated by an action on the part of claimant's attorney, Mr. Dennis Phelps, who contacted Dr. Francisco after Dr. Francisco had been appointed as an independent medical examiner. In the Order appointing Dr. Francisco, Administrative Law Judge Shannon S. Krysl made it clear ex parte communication between the doctor and either attorney of record was prohibited. When the medical reports were received, Judge Krysl was advised that Mr. Phelps had had ex parte communication with Dr. Francisco, contrary to her earlier instructions. In order to ascertain whether any undue influence had been placed upon the doctor by this ex parte communication, Judge Krysl elected to take the slightly unorthodox step of contacting the doctor directly while all counsel were present. The ambiguities contained in the doctor's medical reports were clarified and any question regarding possible undue influence appears to have been answered to the Judge's satisfaction. Judge Krysl advised in the preliminary hearing transcript that she was inclined to rule in the claimant's favor based upon the medical reports and wanted to ensure the reports were an unbiased and objective opinion by the doctor. Once this was verified, the Judge ruled in claimant's favor.

The respondent, in lodging a timely objection to this telephone conference, argues the medical reports of Dr. Francisco were clear on their face, indicating no relationship existed between the abscess suffered by the claimant and the claimant's work-related injury. The Appeals Board must respectfully disagree. Dr. Francisco's report of December 14, 1994, states, "It would appear that he may have already had a urinary tract infection or some infection elsewhere that would have seeded this hematoma."

This medical commentary appears to support a pre-existing infection which was aggravated by or which aggravated the work-related hematoma suffered by the claimant in the fall. The law is well set out in Kansas that aggravation of pre-existing conditions are compensable. The February 8, 1995, Order of Administrative Law Judge Shannon S. Krysl finding claimant's condition compensable as an aggravation of a pre-existing condition is supported by the medical evidence, and the Appeals Board so finds.

The jurisdiction of the Appeals Board is controlled by K.S.A.44-534a which makes applicable to both claimant and respondent the specific criteria required to appeal preliminary hearings. Said appeals from preliminary hearings are for the specific jurisdictional issues regarding whether the claimant suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply. The above issue relates to whether claimant's condition arose out of and in the course of his employment and has been found in favor of the claimant.

The actions of the Administrative Law Judge in contacting Dr. Francisco during the telephone conference are not listed in K.S.A. 44-534a as jurisdictional. K.S.A. 44-551 does give a party the right to appeal from a preliminary order where it is alleged the Administrative Law Judge exceeded the Administrative Law Judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. K.S.A. 44-534a(a)(2) specifies that the Administrative Law Judge shall conduct a preliminary hearing, summary in nature,

and "shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act."

The rules of evidence in a workers compensation setting are not applied as stringently as would be the case under Chapter 60 of the Kansas Statutes Annotated. See Nordstrom v. City of Topeka, 228 Kan. 336, 613 P.2d 1371 (1980).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

As stated above, the method of the Administrative Law Judge was somewhat unorthodox and would clearly be unacceptable in a regular hearing situation where, as here, the doctor was never placed under oath. Nevertheless, in a preliminary hearing it is the Judge's responsibility to conduct the preliminary hearing pursuant to K.S.A. 44-534a. The Appeals Board cannot say this procedure, under these circumstances, is prohibited and further cannot say the Administrative Law Judge exceeded her jurisdiction in conducting this telephone conference. The Appeals Board, therefore, finds that the telephone conference of February 8, 1995, was within the jurisdiction and power of the Administrative Law Judge in controlling her docket and will not be disturbed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl dated February 8, 1995, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 1995.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS  
Michael D. Streit, Wichita, KS

Shannon S. Krysl, Administrative Law Judge  
George Gomez, Director